LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 22 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 690

HERBERT J. SMITH, ET AL., *Appellants*

v.

WILLARD AYRES, Mayor, etc., ET AL., *Appellees.*

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

PARKS M. CARMICHAEL
Post Office Box C
Gainesville, Florida 32601
Attorney for Appellants

ROBERT J. CORBER
1250 Connecticut Ave., N. W.
Washington, D. C. 20036
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

BLANK PAGE

INDEX

	Page
Jurisdictional Statement	1
The Opinion Below	2
Statement of the Grounds on Which Jurisdiction of the Court Is Invoked	2
Questions Presented by the Appeal	3
Statement of Facts of the Case	4
Appellants' Constitutional Objections Were Adequately Presented in the Proceedings Below	6
The Questions Presented Are Substantial	7
Appendix A	1a-23a
Appendix B	24a-29a

TABLE OF AUTHORITIES

CASES:

Baker v. *Carr*, 369 U.S. 186 (1962)	13, 14
Carlson v. *People of California*, 310 U.S. 106 (1940)	7
Covey v. *Town of Somers*, 351 U.S. 141 (1956)	10
Forsyth v. *City of Hammond*, 166 U.S. 506 (1897)	12
Gomillion v. *Lightfoot*, 364 U.S. 339 (1960)	13
Griswold v. *Connecticut*, 381 U.S. 479 (1965)	14
Hammonds v. *City of Corpus Christi*, 226 F. Supp. 456 (S.D. Tex. 1964)	13
Hunter v. *City of Pittsburgh*, 207 U.S. 161 (1907)	3, 12
Kelly v. *City of Pittsburgh*, 104 U.S. 78 (1881)	3, 12
Lambert v. *People of California*, 355 U.S. 225 (1957)	11
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)	10, 11
Reynolds v. *Sims*, 377 U.S. 533 (1964)	9
Schneider v. *New Jersey*, 308 U.S. 147 (1939)	3
Walker v. *City of Hutchinson*, 352 U.S. 112 (1956)	10

Page

STATUTES & CONSTITUTIONAL PROVISIONS:

Chapter 87, Laws of Florida 2

Chapter 29326, Laws of Florida, Special Acts of 1953 .....2, 3, 4, 5, 6, 7, 8, 11, 12, 1a-5a

Id., Sec. (2)(a)(5) 8

Id., Sec. (2)(f) 9

Ordinance No. 238, City of Ocala (Florida) 2, 3, 4, 6, 7, 5a-13a.

Id., Sec. 14 5

Id., Sec. 15 6

Florida Constitution, Art. V, § 4(2) 3

Title 28, U. S. Code, Sec. 1257(2) 3

Code of City of Ocala, Sec. 10-7 6

U. S. Const. Amend. XIV 4, 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

HERBERT J. SMITH, ET AL., *Appellants*

v.

WILLARD AYRES, Mayor, etc., ET AL., *Appellees.*

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

I. JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Florida entered on April 28, 1965, affirming in all respects a Decree by the Marion County Circuit Court of Florida and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

II. THE OPINION BELOW

The opinion of the Supreme Court of Florida is reported in 174 So. 2d 727 (Fla. 1965). A copy of that opinion is in the Appendix B, Part I, to this Statement. The opinion of the Circuit Court of Marion County, Florida is unreported and may be found in the Appendix B, Part II, to this Statement.

III. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

(1) The appellants initiated a plenary action in the Marion County Circuit Court of Florida on May 4, 1964 pursuant to Chapter 87, Laws of Florida, 1963. The complaints filed[1] alleged that:

(i) Chapter 29326, Laws of Florida, Special Acts of 1953, authorizing annexation of territory "adjacent" to the City of Ocala, was unconstitutional under the State and Federal Constitutions;

(ii) Ordinance No. 238 of the City of Ocala, which was enacted pursuant to Chapter 29326, and as such, authorized an election to determine whether lands in which the appellants held an interest should or should not be annexed, deprived the appellants of rights granted by the State and Federal Constitutions, and

(iii) That due to inherent Constitutional infirmities the elections called and conducted on March 17, 1964, pursuant to the above provisions and which allegedly empowered the City of Ocala

[1] Two companion suits were brought. The cases were consolidated for trial by order of the Circuit Court after agreement of counsel that the pleadings and issues were the same—save for references to separate areas affected by the annexation election in question.

to annex certain territories in which the appellants held an interest, should be set aside.

(2) On August 17, 1964, Circuit Judge Smith entered an order denying relief. Pursuant to a provision in the Florida Constitution authorizing direct appeal from "final . . . decrees directly passing upon the validity of a state statute,"[2] action was commenced in the Florida Supreme Court. Thereafter, on April 28, 1965, that Court, with Justice Barns (Ret.) dissenting with opinion, affirmed the lower court in all respects. A timely petition for rehearing was denied on May 28, 1965. Notice of Appeal was filed in that court on August 24, 1965.

(3) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(4) Cases sustaining the jurisdiction of this Court are *Schneider* v. *New Jersey,* 308 U.S. 147 (1939); *Hunter* v. *City of Pittsburgh,* 207 U.S. 161 (1907); *Kelly* v. *City of Pittsburgh,* 104 U.S. 78 (1881).

(5) The validity of Chapter 29326, Laws of Florida, 1953 and Ordinance No. 238 of the City of Ocala are here involved. The text of these provisions are set forth in full in Appendix A.

IV. QUESTIONS PRESENTED BY THE APPEAL

(1) Whether a statute which makes no provision for the giving of notice to the electorate within a reasonably short period of time prior to an annexation election is unconstitutional on its face as

---

[2] Fla. Const., Art. V, § 4(2).

being in contravention of the Due Process Clause of the Federal Constitution.

(2) Whether an election held to determine the question of annexing certain lands into a city proper violates the Due Process Clause of the Federal Constitution when final notice of the election is given twenty-two days prior to the election itself.

(3) Whether a city may, without violating the Equal Protection and Due Process Clauses of the Federal Constitution divide an area proposed for annexation into two separate and distinct zones for the sole purpose of diluting the voting strength of the electorate in the area proposed for annexation.

V. STATEMENT OF FACTS OF THE CASE

The facts are uncomplicated and not in dispute. Chapter 29326, Laws of Florida, 1953, provides a method of annexing territory by referendum to the corporate limits of the City of Ocala, Florida. The Act requires enactment of an ordinance by the City Council describing the territory proposed to be annexed, the date of the election, the effective date of the annexation (if successful), and other terms and conditions. The Act also requires that the Ordinance provide and call for an election, and that a mayor's proclamation containing a copy of the ordinance and calling such election be published once a week for four consecutive weeks prior to the date of such election in a newspaper of general circulation published in the City of Ocala.

Pursuant to the aforesaid Act, the City Council of Ocala enacted Ordinance No. 238 authorizing the an-

nexation election in question. Although purporting to follow the statutory requisites, the ordinance divided the proposed area to be annexed into two separate "zones." The ultimate result of this decision was that persons residing in either of the "zones," or having certain interests therein, were allowed to vote only for or against annexation of that particular area. On the other hand, qualified voters residing in the City proper were given two votes—one for or against annexation of each designated "zone." No authority for such division is contained in Chapter 29326.

Compounding this inherently discriminatory act appellees, in alleged compliance with that portion of Chapter 29326 requiring publication of the Mayor's Proclamation for four consecutive weeks, caused the last notice of publication to be given some twenty-two days prior to the date of election. This decision was not only a violation of its own decision to include in the Ordinance a mandate that notice was to be published for not less than fifteen nor more than twenty days prior to the election,[3] but further a violation of a separate City ordinance requiring such publication prior to any special election (specifically incorporated

---

[3] Section 14 of Ordinance No. 238 states: "Within not less than fifteen nor more than twenty days prior to the date of said election the Clerk of the City of Ocala *shall* cause to be published in a newspaper published in the City of Ocala a notice of the election. Said notice *shall* state the purpose of the election as herein set forth, the time and place of the election, the inspectors and clerks of such elections as appointed by the City Council of Ocala, and the qualification of the electors as provided herein." [Emphasis added.]

by reference into Ordinance 238).[4] No further action was taken to notify the electorate of the election.

The election results were as follows:

Zone 1		Zone 2	
For	Against	For	Against
1506	887	1256	1023

Pursuant to the above results the area was declared to be annexed as of October 1, 1964. The appellants who hold interests in the land declared annexed, immediately turned to the Court for declaratory relief in order to have the election set aside.

VI. APPELLANTS' CONSTITUTIONAL OBJECTIONS WERE ADEQUATELY PRESENTED IN THE PROCEEDINGS BELOW

In their initial complaint, appellants alleged that: (1) Chapter 29326 was unconstitutional and invalid and that Ordinance No. 238 was invalid and of no force and effect (R. p. 9); (2) That the provision in Chapter 29326 stating that "the City of Ocala, Florida, as from time to time existing, may at any time be extended so as to include any adjacent territory" was void for vagueness, and was unconstitutional under the Federal Constitution (R. p. 10); (3) That the manner and method of counting votes described by Ordinance 238

---

[4] Section 15 of Ordinance No. 238 states: "All provisions of Chapter 10 of the Code of Ordinances of the City of Ocala governing elections . . . as are applicable to the purposes of this special election, shall apply to the voting procedures . . . ."

The Code of the City of Ocala, Section 10-7, contains the following provisions regarding notice of special elections: "Upon the passage of such resolution, the City Clerk shall cause to be published a notice of such special election in some newspaper published in the City . . . . Such notice *shall be published* once a week for not less than fifteen nor more than twenty days prior to said election." [Emphasis added.]

constituted a deprivation of appellants' rights to equal protection of the laws as guaranteed by the Federal Constitution (R. pp. 10-11); (4) That the notice required by Ordinance 238 was not given and therefore the election was invalid (R. p. 11); and that all the aforesaid acts of the City of Ocala under the purported authority of Chapter 29323 and Ordinance 238 constituted a deprivation of rights under the due process clause of the Federal Constitution (R. p. 12).

The Circuit Court of Marion County dealt with all constitutional objections—finding them to be without merit.[5] On appeal to the Florida Supreme Court, appellants assigned as error the refusal of the lower court to find in favor of the constitutional objections (R. p. 114-15). The Florida Supreme Court thereafter adopted the lower court's decree in its affirmance (App. B, Part I, pp. 15a-20a). Finally, on motion for rehearing, appellants again reiterated their Constitutional objections (R. pp. 139-40).

VII. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A substantial federal question is presented when a State Supreme Court upholds state legislation[6] as valid and not repugnant to the Constitution where the

---

[5] "Having considered all aspects and provisions of the act, the Court concludes and finds that Chapter 29326 . . . is not an unconstitutional act under the constitution . . . of the United States of America." (App. B, Part II, p. 27a). "[T]he Court does not find that the procedures and methods used in Ordinance No. 238 were . . . in violation of any constitutional rights of the plaintiffs, either under the federal or state constitution." (App. B, Part II, p. 28a).

[6] It is well settled that municipal ordinances adopted under State authority constitute State action and are within the prohibition of the Fourteenth Amendment. *Carlson* v. *People of California*, 310 U.S. 106 (1940).

ultimate result of such a decision is to permit an *unreasonable* extension of municipal boundaries. Using the language in Chapter 29326 to the effect that "any" adjacent territory may be annexed, the City has taken this to be a mandate of unlimited annexation power, and as such has seen fit to disregard all rights of the appellants.

(1) Chapter 29326 § 2(a)(5) requires that the annexation ordinance should call for and make provision for an election "to determine whether the *territory* described in said ordinance" shall be annexed. The terminology refers to "election" and to "territory" in the singular, not the plural. Similarly, the ordinance itself refers to "election" not "elections." Obviously, by the wording of the Act and the Ordinance, only *one* annexation election of the territory in question was contemplated.

It is submitted that the decision to divide the proposed territory to be annexed into two separate and distinct zones—thereby effectually diluting the voting power of the electorate in the area by one-half—constituted a flagrant abuse of authority resulting in a violation of the Fourteenth Amendment. Such procedures and methods used by the City are repugnant to the sense of fair play involved in the meaning of an election, *i.e.*, the freedom of choice. The rule "divide and conquer" should have no place in our scheme of annexation. Otherwise, there is no reason to present any facade of an election—such being a mere sham or illusion.[7]

---

[7] Appellants pointed out to the courts below that in a hypothetical extension of this action, the city could have divided the unannexed area into a myriad of zones so as to effect its own purpose and to ensure that its own voting power could not be overcome by the reduced number of inhabitants in the election area.

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court stated that:

> Diluting the weight of votes because of place of residences impairs basic constitutional rights under the Fourteenth Amendment . . . . [377 U.S. at 566]
>
> . . . .
>
> To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual *lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote* . . . . [T]he weight of a citizen's vote cannot be made to depend on where he lives. . . . A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. [377 U.S. at 567-68 (Emphasis added.)]

Appellants respectfully submit that the arbitrary action taken by the City contravenes the Constitutional rights of the unincorporated voters to have their votes counted *equally* and with the same weight as those of the incorporated voters.

(2) The Florida legislature manifested an intent to provide some procedural safeguards for annexation proceedings. Section 29326(2)(f) provides:

> The Mayor's proclamation calling such election [for annexation] shall . . . be published once a week for four consecutive weeks . . . prior to the date of such election in a newspaper of general circulation published [in the City of Ocala] . . . , the first publication thereof to be not more than two weeks after the date of adoption of said ordinance.

It should be noted that this provision is entirely silent as to what period the four consecutive weeks should

cover, save for the requirement that publication occur within two weeks after adoption of the annexation ordinance.

The City, in alleged full compliance with the statutory procedures, published the last notice *twenty-two* days prior to the special election. Thereafter, in complete disregard of its own ordinance requiring that notice of election be given by publication in a newspaper within not less than fifteen nor more than twenty days prior to the date of the election (see notes 3-4, *supra*), no further action was taken to notify the electorate of the impending annexation election. The appellants cannot quarrel with the lower Court's finding that although the language in the Ordinance states specifically that notice "shall" be given, the requirement is not mandatory—thereby obviating the necessity of its being given. This is a matter of construing state law and is therefore binding on this Court. Appellants do contend, however, that the lapse of twenty-two days intervening between final publication of notice and the election itself was tantamount to giving no notice at all.

The question of whether adequate notice has been given in proceedings affecting property interests has always been considered reviewable by this Court. *Walker* v. *City of Hutchinson,* 352 U.S. 112 (1956); *Covey* v. *Town of Somers,* 351 U.S. 141 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). As recently as 1957 this Court stated:

> Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before *property interests* are disturbed, before assessments are made, before penalties are assessed. Notice is required in a *myriad* of situations where a penalty

> or forfeiture might be suffered for mere failure to act. [*Lambert* v. *People of California,* 355 U.S. 225, 228 (1957) (Emphasis added.)][8]

Moreover, the mere fact that notice is given does not, in an of itself, satisfy the requirements of the due process clause:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated under all the circumstances,* to appraise interested parties. . . .
>
> * * * *
>
> [*W*]*hen notice is a persons due, process which is a mere gesture is not due process.* [*Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-15 (1950) (Emphasis added.)]

It necessarily follows that if notice is to be adequate it *must* be published at a moment reasonably connected in point of time with the fact of which it is giving notice. If not, it is a "mere gesture" and must be held inadequate under the due process clause.

Chapter 29326 fails to recognize this principle—making no provision whatsoever for a maximum period which may elapse between the giving of final notice and the annexation election itself.[9] Peculiarly enough, the City Council recognized this inherent infirmity and *in addition to that which was required by the Act*

---

[8] No serious question can be raised that various rights of the appellants have been affected by annexation. The property involved must now bear its pro rata part of the taxes levied by the City and the inhabitants thereof are bound by the acts, ordinances, resolutions and regulations of the City which not only deprives the inhabitants of the area of their property through taxation but restricts and restrains their liberties under the police power.

[9] Therefore, notice could have been given one month, one year or ten years before the election. On this basis it can hardly be said that the statute meets constitutional standards.

expressly stipulated that notice of the annexation election was to be given not less than fifteen nor more than twenty days prior to the election. At this stage of the proceedings appellees have yet to explain adequately why this notice was not given.

Appellants respectfully urge that Section 29326 be declared unconstitutional on its face and as applied on the substantial grounds that:

> (1) No provision has been made for limiting the time between the giving of final notice for an election and the election itself; and
>
> (2) That on the facts of the instant case the giving of final notice twenty-two days prior to annexation was nothing more than a "mere gesture" and thereby effectively deprived appellants of their rights under the Due Process Clause of the Federal Constitution.

(3) Appellants are well aware of earlier cases decided by this Court which hold, in essence, that no question arises under the Constitution of the United States where property is annexed. *Hunter* v. *City of Pittsburgh,* 207 U.S. 161 (1907); *Forsyth* v. *City of Hammond,* 166 U.S. 506 (1897); *Kelly* v. *City of Pittsburgh,* 104 U.S. 78 (1881).

The continued vitality of these cases is demonstrated by the following language of District Judge Garza in a recent case arising from annexation proceedings in the City of Corpus Christi, Texas:

> The annexation of lands to a city or town has been held *without exception* to be political matter, entirely within the power of the Legislature of the State to regulate.
>
> . . . .

> "Changing such territorial limits is primarily a legislative function, and, subject to such constitutional restrictions as may exist, the legislature has a practically unlimited power to alter the boundaries of a municipal corporation as the public welfare demands, even without the consent of, or notice to, the municipality, its inhabitants, or the inhabitants of the territory effected."
>
> . . . .
>
> Although we may disagree with the mode of annexation or annexations themselves, the remedy of those aggrieved is not in the courts but in the State Legislature. [*Hammonds* v. *City of Corpus Christi,* 226 F. Supp. 456, 458-59 (S.D. Tex. 1964) (Emphasis added.)][10]

This analysis may be correct as far as it goes. However, it does not take into account constitutional considerations which are currently emphasized by the political changes that are in the process of taking effect throughout the nation. Recently, the Court stepped into the "political thicket" and decided that inequitable representation in state legislatures was a problem reaching constitutional proportions. *Baker* v. *Carr,* 369 U.S. 186 (1962). Pursuant to this decision a flat mandate was laid down that the discrimination that had existed in favor of rural dwellers against the urban population should be ended. Inherent in the case is the underlying thought that the political scales should not be tipped in favor of either group.

In *Hammonds* the District Judge indicated that the proper body to turn to for relief is the legislature. This echoes, of course, the words of this Court in its decisions at the turn of the century. However, the

---

[10] There are cases, however, indicating that there may be increasing constitutional restrictions placed on the "unlimited power" of annexation. See, *e.g., Gomillion* v. *Lightfoot,* 364 U.S. 339, 344-45 (1960).

voting strength that rural dwellers today possess does not compare to the power that existed in the past. Realistically, the appellants, and those similarly situated, have little hope that their state legislature will pass appropriate legislation to safeguard their interests against unlimited annexation powers granted to the states by this Court.

Therefore, their only course of action is in the courts. This step is taken with the sincere belief that the same equitable doctrine applied in *Baker* v. *Carr* to relieve urban dwellers of political discrimination will be applied in the current context to protect rural dwellers from the unlimited powers granted the States in annexation procedures. Appellants contend that although they may not have the "unlimited" right to be let alone, *cf., Griswold* v. *Connecticut,* 381 U.S. 479 (1965), they do have the right to be protected from unwarranted and arbitrary annexation procedures adopted by a City for the sole purpose of insuring the success of an election.

It is submitted that the instant jurisdictional statement presents a problem of nationwide importance which demands a brief on the merits and ultimate resolution by this Court.

Respectfully submitted,

PARKS M. CARMICHAEL
Post Office Box C
Gainesville, Florida 32601
Attorney for Appellants

ROBERT J. CORBER
1250 Connecticut Ave., N. W.
Washington, D. C. 20036
Of Counsel